United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 27, 1996

TO : William C. Schaub, Regional Director
Region 7

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Metropolitan Council of Newspaper Unions, et al.
(Detroit Newspaper Agency)
Case 7-CC-1667

560-2550-3300
560-2550-6700
560-7540-4000
560-7540-4070

This case was submitted for advice as to whether the Unions, which are striking two newspapers, violated Section 8(b)(4) when groups of their supporters wearing pro-union T-shirts made mass visits to stores that advertise in the struck newspapers.

FACTS

The constituent members of the Metropolitan Council of Newspaper Unions (the Unions) have been engaged in a strike against the Detroit Free Press, the Detroit News and the Detroit Newspaper Agency since July 13, 1995.

In October 1996, the Metropolitan Council issued a letter to strikers advising them that they must do more handbilling and leafleting during the upcoming shopping season at businesses that advertise in the struck newspapers. The letter stated that recent leafleting had forced several businesses to cease advertising in the struck newspapers.

During the evening of October 14, 1996, apparently in furtherance of the objective set forth in the Council letter described above, 20 to 30 supporters and officials of the Charged Unions engaged in a series of visits to four businesses along a busy street in a Detroit suburb. In each case, when the demonstrators entered the business, they were wearing jackets over T-shirts that said, "Please Do Not Shop Here" on one side and "They Target 2000 Newspaper Families Today They Target You Tomorrow" on the other side. Police were apparently present at all of the locations but did not interfere with the demonstrators. The precise events that occurred at each business are described below:

1. Crown Furniture: after the demonstrators walked into the store at approximately 6:42 p.m. and browsed around, one

demonstrator said, "It's hot in here." All of the demonstrators then took off their jackets, disclosing the T-shirts described above. Although none of the demonstrators approached any customers, three customers soon left the store. When an employee asked demonstrator Robert Ourlian, a Newspaper Guild bargaining team member, why they were picketing a small store, Ourlian said that the Employer should pull its newspaper advertisement from the struck papers. When Ourlian stated that it was time to go, the demonstrators left the store; the incident had lasted approximately 20 minutes. During this period, the vehicles driven by the demonstrators had occupied most of the store's parking spots. Several demonstrators stayed to distribute leaflets at the entrance to the store's parking lot.

2. Art Van Furniture: at approximately 7:05 p.m., handbillers leafleted at driveway entrances to the store's parking lot while demonstrators entered the store, split into smaller groups and took off their coats, so their T-shirts were visible. The demonstrators walked through the store, making loud derogatory comments to each other about the quality of the merchandise. One demonstrator asked a customer "not to shop there." Another demonstrator told a salesperson that Art Van "better stop advertising in the [struck] paper if the company did not want this sort of activity to continue," adding, otherwise "they [the employees] would be joining them [the strikers] without a job." When the store manager asked the demonstrators to leave, one replied loudly that he had "no right to ask them to leave the store," that they "had a right to be there as customers." The demonstrators left the store at about 7:25 p.m. but remained for another 10 to 15 minutes in the parking lot, speaking to one another. All customers had left the store by the time the demonstrators left. The handbillers remained until about 7:45 p.m.

3. Laskey Furniture: demonstrators arrived at approximately 7:30 p.m., 30 minutes after handbilling had started at the driveway entrance. The handbills asked customers not to patronize Laskey because it advertises in, and thereby supports, anti-union, unfair newspapers. The demonstrators entered the store, took off their jackets, and walked around the store for 10 to 15 minutes before leaving. The demonstrators did not speak to the two customers who were in the store during this period. One demonstrator asked the store manager if he was going to continue to advertise in the Detroit News; the manager's response is unknown.

4. James Chevrolet: handbilling began at the driveway entrance to this auto dealership parking lot at approximately 7:25 p.m. The handbillers distributed leaflets containing price information from the "Automobile Invoice Services 1996 New Car Cost Guide." At approximately 7:40 p.m., approximately 15 people in the showroom took off their coats, so that their T-shirts were visible. Shortly thereafter, another 20 demonstrators entered the showroom and also walked around the new and used car lots, sometimes sitting in the cars. Other demonstrators, who had originally talked with sales personnel about possible purchases, ceased their discussions when they took off their jackets. Some of the demonstrators asked customers why they were there and asked them not to shop there, claiming that the business was anti-union, that they were scabs, and that their prices were too high. Other demonstrators said that the cars were expensive, could be bought elsewhere for lower prices, and could rust easily, and that they had heard that the dealership was not a good place to buy a car. One sales person asserts that one of the demonstrators blocked her way as she was walking with a customer to her sales desk and that the customer then left, stating that she was afraid. The Employer further asserts that there were so many demonstrators in the showroom that it was difficult for customers to get close to the cars to inspect them.

ACTION

We conclude that a Section 8(b)(4)(ii)(B) complaint should issue, absent settlement.[1] The Section 8(b)(4)(i)(B) allegation should be dismissed, absent withdrawal.

Section 8(b)(4)(i) and (ii)(B) makes it unlawful for a labor organization or its agents (1) to induce or encourage employees to withhold services from their employer, or (2) to threaten, coerce, or restrain any person where an object is for that person to cease doing business with another employer. This provision reflects the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressure in controversies not their own." NLRB

[1] We agree with the Region that all of the Unions can be held responsible for the unlawful secondary activities because officials and agents of all of the Unions were present at and participated in the activities described above.

v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951).

In Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council,[2] the Supreme Court held that Section 8(b)(4)(ii)(B) of the Act does not proscribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer. In so doing, the Court noted that "there would be serious doubts about whether Section 8(b)(4) could constitutionally ban peaceful handbilling not involving non-speech elements, such as patrolling." 485 U.S. at 568. Thus, the Court interpreted the phrase "threaten, coerce or restrain" to exclude non-picketing activities partaking of free speech.

As a preliminary matter, we note that, under DeBartolo, the handbilling engaged in by the Unions at the entrances to the Employers' parking lots was lawful. We also note that the Unions have not engaged in conventional picketing of the Employers, a coercive activity which is clearly proscribed by Section 8(b)(4).[3]

However, Section 8(b)(4) proscribes more than just picketing. It prohibits all conduct where the union's intent is to coerce, threaten or restrain third parties to cease doing business with the neutral employer, or to induce or encourage its employees to stop working, although this need not be the union's sole objective. Denver Bldg. & Constr. Trades Council, supra, 341 U.S. at 688-89. See also Pye v. Teamsters, Local 122, 875 F. Supp. 921, 927 (D. Mass. 1995), affd. 61 F.3d 1013 (1st Cir. 1995) ("Coercion can take many forms and is often most effective when it is very subtle").

An unlawful intent may be inferred from the "foreseeable consequences" of the union's conduct,[4] the

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[2] 485 U.S. 568 (1988).

[3] See DeBartolo, 485 U.S. at 580 (picketing involves intimidating conduct, not just mere persuasive communication); Chicago Typographical Union, Local 16 (Alden Press, Inc.), 151 NLRB 1666, 1669 (1965).

[4] NLRB v. Retail Store Employees, Local 1001 v. NLRB, 447 U.S. 607, 614 n.9 (1980); UMW, District 29 (New Beckley

nature of the acts themselves,[5] and from the "totality of the circumstances."[6] The Board has found many types of conduct to be "coercive"[7] even though they did not involve any strike or picketing activity.[8]

Therefore, the presence of picket signs is not a sine qua non for a determination that activity should be

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Mining Corp.), 304 NLRB 71, 73 (1991), enf'd, 977 F.2d 1470 (D.C. Cir. 1992).

[5] IBEW, Local 761 v. NLRB, 366 U.S. 667, 674 (1961) (quoting Seafarers Int'l Union v. NLRB, 265 F.2d 585, 591 (D.C. Cir. 1959)).

[6] New Beckley Mining, 304 NLRB at 73. See also Plumbers, Local 32 v. NLRB, 912 F.2d 1108, 1110 (9th Cir. 1990).

[7] "Coercion" is defined as a disruption of the neutral employer's business. NLRB v. Local 825, Operating Engineers, 400 U.S. 297, 304-05 (1971). See also Carpenters, Kentucky State Dist. Council (Wehr Constr., Inc.), 308 NLRB 1129, 1130 n.2 (1992) ("'coercion' means 'non-judicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, or other economic retaliation or pressure in a background of a labor dispute.'" (quoting Sheet Metal Workers, Local 48 v. Hardy Co., 332 F.2d 682, 685 (5th Cir. 1964)).

[8] See, e.g., Sheet Metal Workers, Local 80 (Limbach Co.), 305 NLRB 312, 314-15 (1991) (disclaimer of interest in representation and cancellation of Section 8(f) agreement with unionized company in order to obtain representation of non-union related company), enf'd in pertinent part, 989 F.2d 515 (D.C. Cir. 1993); United Scenic Artists, Local 829 (Theatre Techniques, Inc.), 267 NLRB 858, 859 (1983) (threatening employer with monetary fine for not acquiring union work), enf. denied, on other grounds, 762 F.2d 1027 (D.C. Cir. 1985); Carpenters, Local 742 (J.L. Simmons Co.), 237 NLRB 564, 565 (1978) (demand for premium pay in order to make up for lost work by use of prefabricated doors); Ets-Hokin Corp., 154 NLRB 839, 842 (1965) (threat to cancel collective bargaining agreement due to employer's non-union subcontracting), enf'd, 405 F.2d 159 (9th Cir. 1968).

considered tantamount to picketing.[9] Conduct equivalent to patrolling is an indication that the handbilling may rise to the level of picketing.[10] However, in Alden Press, Inc., supra, the Board held that "patrolling and the carrying of placards . . . does not per se establish that 'picketing' in the sense intended by Congress was involved . . .'One of the necessary conditions of picketing is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises.'" (citation omitted).[11] In that case, the Board found that a union had not violated Section 8(b)(4)(B) by parading through and patrolling shopping centers and public buildings in a non-confrontational manner intended to publicize its dispute with the employer, rather than to dissuade customers from entering the surrounding stores and employees from performing services. Although admittedly designed as an appeal to the public not to patronize the targeted neutral employer, the union's activity there did not occur at places where that employer conducted business.[12]

More recently, courts have agreed with the assertion of a Regional Director that conduct conducted within the premises of a neutral employer is so disruptive of the

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[9] Lawrence Typographical Union No. 570 (Kansas Color Press Inc.), 169 NLRB 279, 283 (1968), enf'd. 402 F.2d 452 (10th Cir. 1965).

[10] Cf. District 1199, National Union of Hospital & Health Care Employees (United Hospitals of Newark), 232 NLRB 443, and authorities cited therein (1977), enf'd. 84 LC para. 10826, No. 77-2474 (3d Cir., August 11, 1978)(Section 8(g)); Lumber & Sawmill Workers Local Union No. 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965)(discussing in the context of 8(b)(7)(C) the meaning of "patrolling").

[11] 151 NLRB at 1669.

[12] Id. at 1668-1669. See also Service Employees Int'l Union, Local 77 (Empire Industrial Maintenance, Inc.), Cases 32-CC-1226, et al., Advice Memorandum dated May 27, 1988. Compare Service and Maintenance Employees Union, Local 399 (The William T. Burns Int'l Detective Agency, Inc.), 136 NLRB 431 (1962)(patrolling in a manner indicating 'clear threat of physical restraint upon those desiring to enter' is coercive within meaning of 8(b)(4)(ii)(B) and outside protection of publicity proviso).

neutral employer's operations and therefore coercive as to violate Section 8(b)(4)(ii)(B), even though the conduct did not involve picketing or patrolling that was tantamount to picketing. In Pye v. Teamsters Local 122, supra, the First Circuit agreed that a Section 10(l) injunction was appropriate to halt the union's program of "affinity shopping," that is, organizing group shopping trips to retail stores that sold beer distributed by a wholesale distributor with which the union had a primary dispute, where the union's supporters would enter a store en masse to make small snack-food purchases which they would then pay for with large denomination bills. This activity led to overcrowded parking lots at the stores, congested aisles, long checkout lines and an exodus of regular and/or impatient customers.[13] The court agreed that there was reasonable cause to believe that the union's conduct violated Section 8(b)(4)(ii)(B) even though there was no picketing and the union's shoppers did not attempt to communicate their message to the stores' customers. The court noted, 61 F.3d at 1023 n. 10, that it was not dealing with the type of activity clearly protected by DeBartolo, such as handbilling at the perimeter of a store or shopping center; instead the union conducted "inherently obstructive activity" inside neutral establishments.

Furthermore, in Simmonds v. Teamsters Local 122, 153 LRRM 2223 (D.Mass. 1996), a Section 10(l) injunction was found warranted against the same union which used a different tactic in continuation of its dispute with the wholesalers. The union lawfully picketed outside a restaurant which was the site of a live radio broadcast for the beer. However, inside the restaurant, members of the union mingled with other patrons, engaged them in conversations and leafleted in support of a consumer boycott of the beer. During the radio broadcast, members of the union shouted slogans opposing the beer company, eventually resulting in the early cancellation of the broadcast and the refusal of the restaurant and the radio station to perform any more promotions for the beer company. The court agreed that the union's conduct was unlawful because it was aimed at coercing the restaurant and the radio station, neutrals in the union's dispute with the beer wholesalers, to stop performing promotions of the beer.[14]

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[13] The underlying unfair labor practice case has settled.

[14] The underlying unfair labor practice case has been tried before an ALJ although a decision has not issued.

Here, the Unions' secondary object is clear: they wish the Employers, who are neutrals in the Unions' dispute with the struck newspapers, to cease advertising in the struck newspapers. To achieve this goal, they have chosen to engage in activity that would discourage potential customers from shopping in the targeted Employers' stores so long as the Employers continue to advertise in the struck newspapers. The Unions' actions have clearly been coercive. In reaching this conclusion, we rely on the following:

1. At the Crown Furniture store, the demonstrators' cars occupied most of the parking spaces, making it difficult for potential customers to park and then enter the store. Three customers in the store left after the demonstrators took off their jackets, revealing their T-shirts.

2. At Art Van Furniture, the demonstrators walked through the store making loud derogatory remarks about the quality of the furniture sold in the store.[15] A demonstrator also told a customer not to shop at the store; all customers had left the store by the time the demonstrators left.

3. At the James Chevrolet dealership, the demonstrators blocked access to cars, interfering with customers who wanted to inspect cars. One demonstrator blocked a salesperson who was walking with a customer, who then left.

4. At all of the businesses, the large number of t-shirt-wearing demonstrators moving around inside the stores intimidated shoppers into leaving the businesses.

In summary, the demonstrators' actions went beyond protected verbal communication of the Unions' messages. The demonstrators did not merely communicate their messages so that shoppers could consider and decide whether to support the demonstrators. Instead, the demonstrators engaged in conduct intended to prevent customers from doing business with the Employers regardless of the customers' opinions about the Unions' messages. Thus, the demonstrators obstructed and otherwise physically interfered with

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[15] Compare Service Employees Local 399 (Delta Airlines), 293 NLRB 602 (1989), where the union peacefully handbilled and published advertisements describing its dispute with the airline's cleaning contractor as well as the airline's alleged safety problems.

customers' access to the Employers' stores, salespeople, and products. The Unions' activity here thus resembles the noisy mass gatherings and interference with neutral employers' business found unlawful in New Beckley Mining, supra, and Laborers Local 332 (C.D.G., Inc.).[16] Their efforts to prevent customers from doing business within the stores resemble the secondary actions of the unions in Pye v. Teamsters Local 122, supra, and Simmonds v. Teamsters Local 122, supra.[17] Such activity is not the persuasive communication protected by DeBartolo. Therefore, we concluded that the demonstrators used unprotected coercion, rather than protected persuasion, to achieve their goals. Furthermore, this physical interference was accompanied by loud and derogatory comments about the neutral Employers' products and prices in an attempt to discourage customers from doing business with these neutrals.[18] As a consequence, customers left the businesses rather than try to do business with the Employers despite the disruptions the demonstrators caused.

In concluding that the demonstrators in this case engaged in unlawful secondary activity, we distinguished Service Employees Local 47 (BP America), Case 8-CC-1470, Advice Memorandum dated December 5, 1991, where we concluded

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[16] 305 NLRB 298 (1991) (union protesting office building's award of asbestos removal work to a subcontractor whose employees were not represented engaged in unlawful secondary conduct when 400 union members surrounded the building and blocked ingress and egress).

[17] See also Midlantic Restaurants, Inc., Cases 4-CC-1783 and -1784, Advice Memorandum dated April 28, 1988 (union with dispute with general contractor engaged in renovating restaurant violated Section 8(b)(4)(ii)(B) when more than 20 union members entered restaurant, each member occupied a separate table, ordered a single beverage, stayed for approximately three hours and then paid with large bills).

[18] See, e.g., Southern California Conference of Carpenters and Its Affiliated Local Unions (Millie and Severson, Inc.), Cases 21-CC-3164 and 21-CG-15, Advice Memorandum dated December 21, 1992 (unions violated Section 8(b)(4)(ii)(B) by disrupting a hospital health fair, occupying seats during a children's fashion show, throwing food into the garbage and proclaiming, while one demonstrator was dressed in a rat costume, that there were rats in the hospital).

that the gathering of 25 to 30 union members in the atrium of an office building for two days where they wore "Justice for Janitors" T-shirts to publicize their dispute with a cleaning contractor used by the building owner was not unlawful because the demonstrators, who made purchases at a snack bar in the atrium and then ate their purchases and congregated there, did not interfere with the normal use of the atrium or otherwise engage in any confrontational activity.[19] Here, on the contrary, the demonstrators engaged in confrontational conduct to coerce customers and otherwise interfered with the normal operations of the neutral Employers.

However, we further conclude that the Section 8(b)(4)(i)(B) allegation should be dismissed, absent withdrawal. The Unions' statements and demonstrations were aimed at persuading customers, not employees, to cease doing business with the Employers. As noted above, there was no conventional picketing of the Employers' businesses, thereby confronting employees. Nor was there any appeal to employees to cease performing their jobs;[20] a demonstrator's statement that employees might also find themselves out of work was merely an opinion as to the economic consequences of a prolonged newspaper strike rather than an attempt to coerce employees into ceasing to perform work. Thus, in the absence of confrontational activity or other efforts to coerce or intimidate employees of the neutral employers,[21] the Section 8(b)(4)(i)(B) allegation should be dismissed, absent withdrawal.

B.J.K.

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[19] See also Service Employees Local 1877 (Service By Medallion), Case 32-CC-1367, Advice Memorandum dated August 24, 1993.

[20] Compare Service Employees Local 87 (Trinity Maintenance), 312 NLRB 715 (1993) at 745 n. 92, where no violation was found, with findings of Section 8(b)(4)(i)(B) violations at 748, 750, 753 and 754.

[21] See International Union, United Mine Workers of America (Ziegler Mines), Cases 14-CC-2265 et al., Advice Memorandum dated September 3, 1995, at p. 6.